No. 146

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,
PETITIONERS,

vs.

CONTINENTAL AIR LINES, INC., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Attorney General,

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,
PETITIONERS,

vs.

CONTINENTAL AIR LINES, INC., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

I. INTRODUCTION

COME NOW the petitioners, by their attorney, Duke W. Dunbar, Attorney General, State of Colorado and Floyd B. Engeman, Assistant Attorney General, State of Colorado, and petition the Court for the issuance of a Writ of Certiorari to review a judgment of the Supreme Court of the State of Colorado, being the court of last resort in the State of Colorado, in the case of *The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, No. 19771.

II. REFERENCE TO OPINIONS BELOW

The opinion sought to be reviewed is reported as *The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, 368 P. (2d) 970, which opinion is not as yet reported in the official reports of the Colorado Supreme Court, but is attached hereto as Appendix A. The opinion was first entered on February 23, 1962. Thereafter a petition for rehearing was filed. As a result the original opinion was modified, and as modified was adhered to on March 5, 1962. The petition for rehearing was denied and remittur issued on this same day.

III. GROUNDS FOR JURISDICTION

The statutory provision relied upon as conferring jurisdiction on this Court to review the judgment or decree in question by Writ of Certiorari is 62 Stat. 929, 28 U.S.C. 1257(3).

IV. QUESTION PRESENTED FOR REVIEW

The question presented for review is as follows:

Does a state statute which prohibits discrimination based on race in the hiring practices of an interstate air carrier conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States by being an undue burden on interstate commerce and prohibited by the preemption of this field by the laws of the United States?

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

> "Powers of Congress — The Congress shall have power: (3) To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

B. Section 4 of the Enabling Act of the State of Colorado reads as follows: (18 Stat. 474, 1 Colo. Revised Statutes 1953, 237, at 238)

> "* * * : Provided, That the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence;"

C. The Colorado Anti-Discrimination Act of 1957 reads in applicable part as follows:

> "80-24-2 Definitions
>
> (5) "Employer" shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof and every other person employing six or more employees within the state; * * *."
>
> "80-24-6. Discriminatory and unfair employment practices. —
>
> (2) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in

the matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry."

These statutory provisions are found in the Colorado Revised Statutes of 1953, Vol. 8, Permanent Supplement, at pp. 1008 and 1010, thereof.

VI. STATEMENT OF THE CASE

(References are to page numbers of the consolidated record.)

This case involves Marlon D. Green, a U. S. Air Force pilot officer with the rank of Captain, who sought employment as a Commercial air-line pilot. While stationed in Japan with the Air Force, he sent letters of application to most of the main air-lines in the United States, but with no success. On April 27, 1957, on his return from Japan, he secured an employment application form from the San Francisco office of the respondent, Continental Air Lines, Inc. (hereinafter referred to as "Continental"). This was sent to the Denver office of Continental for consideration for employment as a pilot. It was received April 30, 1957 (p. 224 and 225). Within three weeks Continental advised Mr. Green they were not hiring pilots at that time but that his application would be kept on file for future consideration (p. 225).

In June 1957, Continental began recruiting for some fourteen or fifteen pilots. It asked Green to come to Denver for an employment interview not knowing he was a negro (p. 226, 227, and 433). Green arrived in Denver on June 24, 1957. The next morning he reported to Con-

tinental's office at Stapleton Air-Port. Shortly thereafter at the direction of Captain Cramp, Assistant Chief Pilot for Continental, Green took a link trainer and flight test (p. 231, 232, and 235-239). Green and five others were all considered at about the same time for employment as pilots by respondent. They were all found to be qualified according to the standards prescribed by Continental (p. 360). Of the six, Green had by far the most previous flying experience as shown by the following table:

	Total Hours	First Pilot	Co-Pilot	Multi Engine	
Green	3071:30	1838:15	778:45	2900:00	(p. 490, 310)
George	2100:53	1145:35	874:13	897:23	(p. 474, 494)
Stearns	1200:00	750:00	450:00	934:00	(p. 478, 493)
Bryant	1150:00	1160:00	—	5:00*	(p. 486, 495)
Dresser	1031:00	916:00	—	—	(p. 482, 496)
Cole	1000:00	900:00	100:00	200:00	(p. 470, 497)

* Acquired between June 25, 1957, when Green and Bryant were examined and July 1, 1957.

Mr. Harold W. Bell, Vice-President Personnel, Continental Air Lines, Inc., admitted Mr. Green was considered to be a qualified pilot by Continental (p. 343). Mr. Kenneth C. Sorby, Manager, Employment and Employee Relations, Continental Air Lines, Inc., called as a witness said of Mr. Green, "All you have to do, I think, is shake hands with this fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along." (p. 405)

Continental asked four of the six June 1957 applicants to enter its training program in July 1957. (p. 353) Later, in August 1957, Continental hired ten pilots. (p. 325) The fifth of Green's contemporary applicants was ordered into the training program in September. (p 365) Green was never asked to enter the training program, nor was he ever hired.

When Continental wired for Green to come to Denver, it did not know he was a negro, since he had not shown his racial designation as required by the application form furnished to him and one of the other of the six June applicants. (p. 235-237, 343) The form not requiring racial designation, was identified by respondent's witness Bell, as being the form used since January 1954. (p. 155) He could not explain how Green's application happened to require "race" and why he was requested to enter the word "negro" on the application blank by Captain Cramp, respondent's Assistant Chief Pilot. (p. 156)

When questioned as to why five of the six June 1957 applicants, were selected for training and Green was not, Mr. Bell said he didn't know exactly who or how the decision was made. Mr. Sorby, Continental's Personnel Manager, described the pilot selection as "quite informal" and "haphazard." He stated that qualified pilots were not rated showing one man better than another by reason of having more hours or something of that sort. He stated that, "It could be happenstance that Green with his record was omitted," and that the reason Green wasn't hired was that, "We didn't need that number of pilots." (p. 179, 184)

Continental's policy manual states that *applicants* "will be considered solely on the basis of fitness and ability for the work as determined by such factors as character, skill, intelligence and physical qualifications." It places responsibility for selection upon the department head or his designated representative to "select from the applicants referred to him by the Employment Manager, the individual *best suited* for the position." (p. 437) Mr. Sorbey stated that the pilot job is of high importance.

About July 8, 1957, Mr. Bell wired advising Green that he was not selected for the July training class. The telegram was sent to the address of his parents in Arkansas. (p. 435) Green was told this by Bell when he telephoned him long distance after waiting several days past July 4th, 1957, the last day of the promised ten within which he was told he would be notified. (p. 241) This telegram was not received by his parents. Continental's Exhibit 3, (p. 447) refers to such a telegram as undelivered.

Green was not given the usual interview at the place the other applicants received it, nor was he given a physical examination.

Continental ceased to consider Green for employment because of a newspaper article appearing in early August to the effect that Green had filed formal complaints alleging discrimination because Continental was not interested in those pilots who make the front page. (p. 328, 441)

Green filed a complaint with the Commission on August 13, 1957, Appendix B. (p. 165 of record) Continental was ordered to appear for a hearing on the Complaint on April 23, 1958. (p. 166) The Answer by Continental was filed on the day of the hearing which was had by agreement on May 7, 1958. (p. 180) The question concerning the conflict of the Colorado Anti-Discrimination Act of 1957, with Article I, Section 8, Clause 3 of the Constitution of the United States was raised by Continental in the "Third Defense" of said Answer, (p. 172-175) which in that part reads as follows:

"1. Respondent is engaged in the interstate transpor-

tation of passengers and freight by air by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air, including the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. Sec. 401 et seq.) and the Railway Labor Act, as amended (45 U.S.C.A. Sec. 151 et seq.)

"2. By such laws, statutes and regulations the United States has pre-empted and reserved to its exclusive jurisdiction the regulation and control of interstate commercial carriers by air pursuant to the provisions of Article I, Section 8 of the Constitution of the United States.

"3. The provisions of the Colorado Anti-Discrimination Act of 1957, purporting to regulate and control Respondent in its operations as an interstate commercial carrier by air, are and constitute an undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

"4. By reason thereof, the said Act is unconstitutional and void insofar as it purports to regulate and control Respondent's operations as an interstate commercial carrier by air."

Following the hearing and the submission of briefs, the Anti-Discrimination Commission rendered its Findings of Fact, Conclusions of Law and Orders relative to the Complaint of Marlon D. Green on December 19, 1958, wherein the Commission concluded the act was constitutional and that Continental had discriminated against Green. Appendix C. Continental was ordered to give

Green the first opportunity to enroll in its next training course with a priority status of June 24, 1957.

Continental appealed the decision of the Commission to the District Court of Denver, Colorado. Again the question of the violation of the Constitution of the United States was raised. At this point Green had his first opportunity to resort to the 1875 Enabling Act of the Congress of the United States. This he raised in his Answer to Continental's Petition to Review. (p. 33) The District Court remanded the case to the Commission to make findings of Fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the discrimination statute, and whether the job Green applied for actually involved interstate commerce. (p. 44, 45) As a result the Commission vacated the former decision and entered a new decision. (p. 526-544) Upon return to the District Court, the Court held the Commission, by its new order, had made the complaint moot. (p. 65) This decision was reviewed by the Colorado Supreme Court by Writ of Error, in case No. 19215, *The Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, (1960),.....Colo....., 355 P. (2d) 83. The Supreme Court held the Commission had no power to withdraw its first decision; therefore, its second decision was void. Since the trial court had never ruled on the review of the first decision of the Commission, it was ordered to do so.

The Commission and Respondent then entered into a Stipulation that (1) Respondent was engaged in interstate commerce; (2) the Commission would find Continental was subject to the Anti-Discrimination Act and (3) the job Green applied for involved interstate operations. (p. 550-551) The District Court then heard further argu-

ments and briefs were submitted. The District Court entered extensive Findings, Conclusions, and Judgment (p. 557-590) The Court held the Anti-Discrimination Law as applied to Continental violated the Constitution of the United States and since Congress had pre-empted the field Colorado's Anti-Discrimination law could not be applied to one engaged in interstate commerce, such as respondents, Continental Air Lines, Inc. Appendix D.

On review by way of Writ of Error, the Supreme Court affirmed the judgment of the District Court on the grounds that "with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."

VII. GROUNDS AND REASONS FOR GRANTING CERTIORARI

Petitioners submit this is a case which comes within the provisions of Rule 19 (1) (a) of the Rules of this Court in that the decision of the Colorado Supreme Court concerns a federal question of substance not heretofore determined by this Court. Although this Court has decided many cases touching upon the power of the states to legislate in the area of interstate commerce, this Court has not been called upon to decide whether a state anti-discrimination statute prohibiting discrimination as to color by an interstate air carrier in its hiring practices falls within that area of interstate commerce which by nature requires uniformity of regulation and would be outside the state's power to so control by state legislation.

This Honorable Court has indicated such questions

are properly brought to this forum by their very nature. In this regard, we find the following statement by this Court in *Hall v. De Cuir* (1877), 95 U.S. 485, 488:

> "The line which separates the powers of the States from this exclusive power of Congress is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line in all cases be located. *It is far better to leave a matter of such delicacy to be settled in each case upon a review of the particular rights involved.*" (Emphasis supplied.)

That a diversity of opinion exists as to whether the Colorado Anti-Discrimination Act of 1957 violates these premises is self-evident from the opinion herein of the Colorado Supreme Court, it being a 4-3 decision. Justice Frantz filed a lengthy dissent, as did Justice Pringle. Also, our former Justice Doyle, now judge of the Federal District Court of Colorado, filed a lengthy concurring opinion to the former opinion when this case was first before our Supreme Court in *Colorado Anti-Discrimination Commission v. Continental Air Lines* (1960), 143 Colo. 590, 355 P. (2d) 83, 86, in which he expressed views in accord with the present dissents of Justices Frantz and Pringle.

It is also of importance to note that in all the briefs heretofore submitted, including those of Amicus Curiae consisting of American Jewish Committee, Anti-Defamation League of B'nai B'rith, and the Civil Rights Division of the Department of Justice, counsel for each party con-

cerned have not been able to cite a case that has expressly answered the problem with which this case is concerned.

Petitioners' primary reason for believing the Writ of Certiorari should be granted rests upon the premise that the Colorado Supreme Court in relying almost entirely upon *Hall v. De Cuir* (1877), 95 U.S. 485, as supporting its opinion, misapprehended and wrongly applied the *De Cuir* case.

It was pointed out that *Hall vs De Cuir*, supra, was "handed down seventy-six years prior to *Brown v. Board of Education*, 247 U. S. 483;" that the case "has been evaded and devitalized" and that it "has no vitality today." To overcome such arguments, the Colorado Supreme Court cited *Huron Portland Cement Company v. City of Detroit* (1960), 362 U.S. 440, as current approval by this Court of the doctrine of *Hall v. De Cuir*, supra.

The *Hall v. De Cuir* case appears to have been cited in *Huron Portland Cement Company*, supra, for the basic principles of law pertaining to who shall regulate interstate commerce and not because of the facts of the case. In brief, *Hall v. De Cuir*, says that what is or is not a regulation of interstate commerce cannot be decided by any set standard, but must be considered on a review of the particular rights involved in each case. In *Huron Portland Cement Company*, supra, page 443, this Court said:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce', . . . never

> intended to cut the State off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

The Colorado Supreme Court also relied upon *Morgan v. Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L.Ed. 1317 as supporting its conclusion the interstate commerce clause permits only federal regulation of discrimination by an interstate carrier and that states have no power to legislate in this area. We believe the court also misapprehended the effect of this case because this court said, on page 378, of 328 U.S., to-wit:

> "Burdens upon commerce are those actions of a state which 'directly impair the usefulness of its facilities for such traffic'. * * *. A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements."

Since the Virginia statute required segregation of passengers, whereas the national policy required equal treatment, this court was right in applying the doctrines set out above and holding the act unconstitutional as was done in *Hall v. De Cuir*, supra. However, for the Colorado Supreme Court to apply these same rules to a state statute which is in conformity with and in the furtherance of the "national requirement" and to then reach the conclusion the statute is unconstitutional seems to be a clear misapplication of the case and a wrong result.

We submit that *Morgan v. Virginia*, supra, doesn't stand for the proposition that all regulation of discriminatory practice by an interstate carrier is vested in the federal government. On the contrary this court concluded only that the Virginia statute upset the balance between the police power of the state and the need for national uniformity.

This same conclusion is not applicable to the Colorado Anti-Discrimination Act of 1957 because the act does not affect the passengers — it only applies to the employees. No undue burden has or can be shown. There is an entirely different regulation of interstate commerce by a state statute which requires segregation of passengers by an interstate carrier when compared with a state statute which prohibits discrimination by an employer in the hiring of employees. The former concerns the primary purpose of the carrier — the passengers. The latter concerns only a tool or means of carrying passengers, being the pilot in this instance. The former is direct — the latter indirect. The former is prohibited — the latter is allowed. The Colorado Anti-Discrimination Act of 1957, as applied to respondent, Continental is in this latter category. It is a valid enactment pursuant to the police power of the state and in conformity with the national requirement.

Further, the Colorado statute merely codifies that which is guaranteed by the 14th Amendment of the Constitution of the United States and which is in furtherance of the Congressionally enacted Enabling Act to the Constitution of Colorado. To say that a statute which forces an interstate carrier to comply with the Constitution of the United States by giving equal rights, privileges and protection to all, can hardly be said to be an undue restric-

tion on interstate commerce and to be prohibited by any acts of Congress or by its silence upon the subject.

The second reason for granting the writ of certiorari is founded upon the premise that the opinion of the Supreme Court in this case had been decided in a way probably not in accord with applicable decisions of this Court. As stated previously, no decision of this Court can be found that is exactly in point, but of the cases found, *Railway Mail Association vs. Corsi* (1945), 326 U. S. 88, seems most closely in point and should be controlling here. Had the Supreme Court of Colorado followed the rationale of that case, the decision herein would have been to the contrary.

The part of the *Corsi* case with which we are concerned has to do with the argument presented by the petitioner, Railway Mail Association, that the New York anti-discrimination law conflicted with Article I, Section 8, Clause 7, of the Federal Constitution and that Congress had preempted the field; thereby precluding New York from applying its anti-discrimination law. This Court rejected these arguments by holding that "Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties before the police power of the state is powerless." This Court found "no such clear manifestation of Congressional intent to exclude" in the *Corsi* case.

The foregoing principle and rationale are particularly applicable to the case at bar. In *Corsi*, supra, the Constitutional provision cited authorizes Congress to establish postoffices and post-roads. The constitutional provision in our case authorizes Congress to control interstate com

merce. If the State of New York can legislate and control membership practices of the postoffice employees organization, can't Colorado legislate and control employment practices of an interstate carrier who does its hiring and maintains its employment office in Colorado? We submit that Colorado can so legislate and apply its statute to such a carrier as Continental.

VIII. CONCLUSION

The foregoing statements raise serious doubts as to the correctness of the decision of the Colorado Supreme Court. We believe it is of utmost importance that this Honorable Court undertake a detailed review of this case and the broad ramifications of the principles involved.

WHEREFORE, petitioners pray this Petition for Writ of Certiorari be granted so that the injustice done to Marlon D. Green can be corrected.

Respectfully submitted,

DUKE W. DUNBAR,
Attorney General,

FLOYD B. ENGEMAN,
Assistant Attorney General,

104 State Capitol,
Denver 2, Colorado,

Attorneys for Petitioners.

Appendix A

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN,
Plaintiffs in Error,

v.

CONTINENTAL AIR LINES, INC.,
Defendant in Error.

Error to the District Court of the City and County of Denver

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be; and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

By the Court. En Banc. February 13, 1962.

CLERK'S OFFICE

SUPREME COURT

STATE OF COLORADO

DENVER 2

March 5, 1962

Case No. 19771

The Colo. Anti-Discrimination Comm., et al.,

v.

Continental Air Lines, Inc.

The Honorable Duke W. Dunbar,
Attorney General,
State Capitol,
Denver, Colorado.

Dear Sir:

On consideration of the petition for rehearing in the above numbered and titled cause the court today ordered the opinion heretofore filed herein modified and as modified adhered to, and that the petition for rehearing be denied.

Please substitute the enclosed page 5 for the liked numbered page in the opinion of the court filed in the above numbered and titled case, February 13, 1962.

Yours very truly,

GEORGE A. TROUT, Clerk.

By Florence Walsh
Deputy Clerk.

Received March 5, 1962, office of the Attorney General.

IN THE
SUPREME COURT OF THE STATE OF COLORADO

The Colorado Anti-Discrimination Commission, et al., Plaintiffs in Error, vs. Continental Air Lines, Inc., Defendant in Error.	Error to the District Court City and County of Denver

19771

The court having considered the petitions of plaintiffs in error for rehearing in said cause, and now being sufficiently advised in the premises, it is this day ordered that said petitions be, and the same hereby are, denied.

By the Court. En Banc. March 5, 1962.

NO. 19771

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN,
Plaintiffs in Error,

v.

CONTINENTAL AIR LINES, INC.,
Defendant in Error.

} Error to the District Court of the City and County of Denver

Honorable William A. Black, Judge

EN BANC — JUDGMENT AFFIRMED

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Mr. Joseph Mosko,
Mr. James Radetsky,
Mr. Stanton Rosenbaum,
Mr. Walter M. Simon,
Mr. Anthony F. Zarlengo,
Mr. William S. Powers,
Amici Curiae.

MR. JUSTICE MOORE delivered the opinion of the Court.

Marlon D. Green filed a complaint before the Colorado Anti-Discrimination Commission in which he alleged that the Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a Nego. It was further alleged that Continental Airlines violated the said act in that its forms of application for employment as a pilot contain at least two specifications prohibited by the act, namely, attachment of a photograph and requiring the applicant to state his race.

After a hearing before the Commission it ordered that:

> "The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

On review of the commission's order the district court held that the Colorado Anti-Discrimination Act, in so far as it purported to regulate the employment of flight crew personnel of an interstate air carrier, was invalid as creating a burden upon interstate commerce. The trial court entered a judgment ordering the dismissal of Green's complaint before the commission. Green and the commission are here by writ of error seeking reversal of the judgment.

In 1937 the General Assembly enacted the following statutes — (now C.R.S. '53, 5-1-2, 5-1-3 and 5-1-8).

> "5-1-2: NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform

regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation or aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

"5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

Thus in 1937 the legislature gave recognition to federal laws and regulations in the realm of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides in C.R.S. '53, 80-24-2 (5):

> "'Employer' shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * *"

80-24-6 (2) provides that it shall be an unfair employment practice,

> "For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry."

Continental Airlines, among other defenses not necessary to consider, raises the question of whether the Anti-Discrimination Commission has any jurisdiction over the subject matter of the action.

It is admitted that Continental is a commercial carrier by air; that it operates pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. The company provides air transportation

for passengers, freight, and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce, and it was further agreed that the particular employment sought by Green involved interstate operations.

Continental contends that the Colorado statute under which these proceedings were instituted, as applied to the facts of this case, is unconstitutional and void under Article I, Sec. 8, clause 3 of the Constitution of the United States which provides:

> "The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The trial court adjudged in effect that the Colorado Anti-Discrimination Act cannot constitutionally be extended to cover the hiring of flight crew personnel of an interstate air carrier; that if said Act be applied to the hiring contracts of interstate air carriers it would unconstitutionally burden interstate commerce and would amount to an invasion of a field pre-empted by the United States under (a) The Railroad Labor Act; (b) the Civil Aeronautics Act; and (c) Federal executive orders dealing with discrimination by employers contracting with the federal government. The trial court entered judgment setting

aside the findings of the commission and dismissing Green's complaint.

The United States and certain other groups interested in the subject matter of the controversy were granted leave to file briefs as amici curiae. In the brief filed by the Assistant Attorney General of the United States, argument is advanced under separate captions as follows:

> "I. The Commission's assertion of jurisdiction herein does not unconstitutionally burden commerce.
>
> "II. Colorado is not precluded by federal legislative or executive action from applying its anti-discrimination policy to the hiring practices of interstate air carriers."

Counsel for Green, in substance, make the same argument on the question of whether the State of Colorado has jurisdiction to regulate the hiring practices of those engaged in interstate air transportation.

With reference to the above stated propositions Continental presents lengthy argument under the following captions:

> "1. The Colorado Anti-Discrimination Act May Not Constitutionally be Applied to Flight Crew Personnel of an Interstate Air Carrier.
>
> "A. Application of the Colorado Anti-Discrimination Act to the Facts of This Case is Unconstitutional as a Burden on Commerce.

"B. Acts of Congress have Pre-empted the Subject Matter of this Litigation, Thereby Precluding Action by the States."

Although additional arguments on other matters are contained in the briefs, they were not determined in the trial court. The only question resolved was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground.

The first question to be resolved on this writ of error is whether the Colorado Anti-Discrimination Act may be applied to flight crew personnel of an interstate air carrier. If the question is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution, are academic and of no materiality to the issue to be determined.

The trial court entered extensive Findings of Fact, Conclusions of Law and Judgment. As set forth in the appendix to the brief of Continental, this document consists of thirty-eight printed pages. It is very apparent that the learned trial judge gave careful consideration to the numerous decisions of the Supreme Court of the United States which bear upon the issue. Many of them are analysed in the judgment entered by the court. The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result.

From the numerous opinions written by the United

States Supreme Court dealing with the legality of state regulation of those engaged in interstate commerce, two basic propositions have been firmly established, to-wit:

(1) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and

(2) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are in some substantial degree of local concern; once the Congress does legislate upon the subject, it pre-empts the field and the states are thereafter without power to act.

An attempt by the state to apply a statute imposing burdens or restrictions upon persons engaged in either of the foregoing areas of interstate commerce will be set aside and held for naught as contravening the plenary power of the Congress to regulate interstate commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299, 13 L. Ed. 996; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515; *Minnesota Rate Cases*, 230 U.S. 352, 33 S. Ct. 729. This power in Congress is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat 1, 6 L. Ed. 23.

Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. Whatever our private

notions may be on the subject, the opinions of the U. S. Supreme Court have established the rule.

In *Hall v. De Cuir*, 95 U.S. 485, 24 L. Ed. 547, (1877), the court had before it a Louisiana statute which prohibited discrimination in passenger accomodations within the state. The defendant, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accomodations to a Negro and was sued by her. The court concluded that the statute as applied to those engaged in the transportation of passengers among the states was unconstitutional. The court said, inter alia:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position."

In *Morgan v. Virginia*, 328 U.S. 373, 66 S. Ct. 1050, a statute of the State of Virginia required segregation of white and colored passengers for both intrastate and interstate motor vehicle carriers. An interstate passenger who was a Negro challenged the validity of the statute as placing a burden on interstate commerce. The court held that the statute as applied to interstate carriers was unconstitutional. *Hall v. De Cuir, supra*, was approved in the following language:

> "The factual situation set out in preceding paragraphs emphasizes the soundness of this court's early conclusion in Hall v. DeCuir."

Counsel seeking reversal of the judgment of the trial court attempt in various ways to discredit the opinion of *Hall v. DeCuir*. It is asserted in the brief filed by the United States as amicus curiae that *Hall v. DeCuir* was "handed down seventy-six years prior to *Brown v. Board of Education*, 247 U. S. 483"; that the case has "long been eroded and devitalized" and that it "has no vitality today." The Supreme Court of the United States has not so indicated. *Brown v. Board of Education, supra*, did not involve interstate commerce. As recently as 1960 *Hall v. DeCuir* was cited with approval in *Huron Portland Cement Company v. City of Detroit*, 362 U. S. 440, in which the United States Supreme Court said: "But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hall v. DeCuir*, 95 U.S. 485."

Our attention is invited to the fact that the United States does not consider *Hall v. DeCuir*, to be "devitalized" in those matters in which application of the doctrine for which it is authority will promote a result sought by the government. On September 2, 1960, the United States appearing by counsel, who are on the brief in the instant case, filed a brief as amici curiae with the Supreme Court of the United States in *Boynton v. Virginia*, 364 U. S. 454, in which we find the following:

> "Thus, even in the absence of congressional action, the Commerce Clause, of its own force, requires invalidation of unreasonable state-imposed burdens on interstate commerce. See *Morgan v. Virginia*, 328 373; *Hall v. DeCuir*, 95 U. S. 485. * * *"

Thus it will be seen that counsel for the United States,

appearing here as amicus curiae, attempts like the Roman god Janus to face both ways.

The State of Colorado either does or does not have power to legislate concerning racial discrimination by employers engaged in interstate commerce. The authority of the state does not come into existence in the event the exercise thereof will produce a result which may tend to promote a particular cause and then disappear or become impotent when the exercise thereof may lead to a different result. Jurisdiction to function does not depend upon what results will flow from the exercise of regulatory power.

The Supreme Court of the United States has clearly indicated that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a "need for national uniformity," and that the states are without jurisdiction to act in that area. *Morgan v. Virginia, supra.*

The judgment is affirmed.

MR JUSTICE FRANTZ, MR. JUSTICE McWILLIAMS and MR. JUSTICE PRINGLE dissent.

No. 19771

Colorado Anti-Discrimination Comm.

v.

Continental Air Lines

MR. JUSTICE FRANTZ dissenting:

The overriding and cardinal purpose of this case is to ascertain the relation between federal and state authority based upon the fundaments of the commerce clause (U. S. Const. Art. 1, §8, cl. 3) and the equal protection mandate to the states contained in the 14th Amendment to the Federal Constitution. Is there an area of accomodation between nation and state in which the state may act affirmatively to see that no one is denied employment by reason of his "race, creed, color, national origin or ancestry," notwithstanding the employment will require travel over state lines?

The majority opinion believes that a valid reconciliation is not possible, and that the Colorado Anti-Discrimination Act of 1957 is ineffectual as to employment contracts of Continental Air Lines, Inc., an interstate commercial carrier by air. Since I do not share this belief, I voice a view at variance with the majority.

At least five reasons come to my mind which provoke dissent. There may be other cogent and perhaps more convincing reasons for opposing the majority opinion, but those which move me to disagree are, in my opinion, principles established in law and reason. Their application brings into proper perspective the interrelation of the two federal constitutional provisions already adverted

to, and establishes the propriety of the Colorado act as it affects Continental's operations. *United States v. Underwriters Ass'n.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440.

Before launching into a discussion of these reasons it would be well to keep in mind that the Colorado Anti-Discrimination Commission had made findings adverse to Continental, and that these findings are based upon evidence. And the Commission made the critical finding that the only reason that Green "was not selected for training school [was] because of his race." It is suggested that a better understanding of this controversy will be realized by reading the opinions in *Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P. (2d) 83, to which the present matter is a sequel.

I would now enumerate my reasons for holding the Colorado act to be in harmony with the commerce clause. 1. A contract of employment is not commerce; it is not an intangible that enters into the stream of commerce just because the employee travels from state to state. 2. Conditions of employment, statutorily imposed, forbidding hiring on the basis of race, creed, color, national origin or ancestry are federally recognized as being properly within the sphere of state police power and in this connection inoffensive to the commerce clause. 3. It is a traditional concept of the federal government that an employment contract is ordinarily controlled by the law of the state where made, and reasonable regulation of the state regarding such contracts will be honored by the nation. 4. State laws prohibiting discrimination on the basis of race, creed, color, national origin or ancestry are in aid of commerce and not a burden on it, and hence sanctioned

by the federal government. 5. By enacting laws banning such discrimination the state merely implements and fulfills the interdictions of the 14th Amendment to the national Constitution, and exercises the power delegated thereunder to preserve the rights of citizens, required by the Federal Constitution to be protected by the states.

1. A contract of employment of a pilot of an interstate carrier by air is not interstate commerce. Such contract per se does not move in commerce, although the employment thereunder requires operation of airplanes through several states. If Green had been hired, at once the employment relationship would have been established: Continental as employer and Green as employee would have become a fait accompli. Nothing could be a more localized activity: the creation of the contract arose within the state: its existence resulted from an activity wholly within the state.

True, that which Green would have done as a result of the *established* relationship would have been interstate commerce. Affording due regard to the distinction between the local matter of employment, and the activities of the employee thereafter as commerce, is not a strained and tenuous process. Federal courts have recognized that the mere fact that a domestic transaction generates a movement in interstate commerce is not sufficient to declare the transaction interstate commerce. *Jewel Tea Co. Williams*, (10th Cir.) 118 F. (2d) 202.

Indeed, the federal courts sound warnings against encroachment on state competence. "If the power to regulate interstate commerce applied to all the incidents to which said commerce [illegible] rise to all contracts which

might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature." *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed 297.

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

Although the present problem is one without pat precedent, we are not without straws in the wind. The Supreme Court of the United States asked itself "whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of *hiring persons to labor outside the state limits*, because in conflict with the Federal Constitution." (Emphasis supplied.) *Williams v. Fears*, 179 U.S. 186, 21 S.Ct. 128, 45 L.Ed. 186.

Its answer has relevance to our problem:

"* * * These labor contracts *were not in themselves subjects of traffic between the states*, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that

it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce." (Emphasis supplied.)

"[B]y the law of New York the creation of an agency is to be determined by the law of the place where the acts take place which are relied upon to create it." *Siegman v. Meyer*, 100 F. (2d) 367. The question of agency "is to be determined by the law of New York, because the scope of an agent's authority depends upon the law of the place where the authority is conferred." Per Learned Hand in *Still v. Union Circulation*, 101 F. (2d) 11. The place where the contract of employment is made is controlling as to the law. *Moore v. Ill. Central R. Co.*, 136 F. (2d) 412; *Hablas v. Armour & Co.*, 270 F. (2d) 71; *Helfer v. Corona Products*, 127 F. (2d) 612.

Contracts for advertising space in a national magazine, though involving publishing advertising and the mailing and distribution of magazines outside the state, are "peculiarly local and distinct from * * circulation whether or not that circulation be interstate commerce." *Western Live Stock v. Bureau of Internal Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823.

"That which in its consummation is not commerce does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer

goes to another state." *Federal Baseball Club v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898, 26 A.L.R. 357.

I would hold that the contract of hiring, as it established an employment relationship, would have been consummated in the State of Colorado and subject to the domestic laws of the state. The fact that Continental engaged itself to carry passengers by air through several states, and that Green would have been a part of the air flight personnel, would have been an incident of the contract of employment. Continental's engagement to carry passengers would have been interstate commerce. Green's contract would not have been an undertaking to carry *A*, *B* and *C* as passengers outside the state; his engagement would have been to work at a certain position for Continental.

2. A state enactment, having as its objective the prevention of contractual discrimination in employment emanating from prejudice or preference concerning race, religion, color, national origin or ancestry, is sanctioned as the proper exercise of the police power of the state, even though its effect in particular cases may result in an impact on interstate commerce. Where the law thus bears upon such commerce, the federal courts generally find no invalidating encroachment on the national domain in commerce.

That statutory laws prohibiting discrimination on the basis of color, race, creed, national origin or ancestry in connection with certain relationships find validity in the police power cannot be controverted. "The execution of this power and the enactment of laws pursuant to it are

necessary to the well-being of the people of all civilized communities." *Bolden v. Grand Rapids Operating Corp.*, 239 Mich. 318, 214 N.W. 241, 53 A.L.R. 183. See "Employment Discrimination," 5 Race Relations Reporter 569 (1960).

Legislation directed against racial or religious discrimination is action "within the bounds of the police power." *New York State Commission v. Pelham Hall Apts.*, 170 N.Y.S. (2d) 750. It is declarative of the state's public policy against discrimination, *Application of Association for the Preservation of Freedom*, 188 N.Y.S. (2d) 885; and its purpose is the promotion "of the public good," *City of Chicago v. Corney*, 13 Ill. App. (2d) 396, 142 N.E. (2d) 160.

Legislative measures aimed against "discriminations in the areas of employment predicated upon prejudices and preferences arising out of race, religion, color or national origin" establish a public policy for the state concerning the relationship of employer and employee. *U. S. National Bank v. Snodgrass*, 202 Ore. 530, 275 P. (2d) 860, 50 A.L.R. (2d) 725.

Recognition of such legislation as the exercise of the state's police power has been accorded by the Supreme Court of the United States. "And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states." *District of Columbia v. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480. See *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88, 65

S.Ct. 1483, 89 L.Ed. 2072; *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.

Conditions of employment between one operating in interstate commerce and an employee, fixed by the state under its police power, have been the subject of attack in the federal courts. Thus, in *Smith v. Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed 508, a statute of Alabama was claimed to be in violation of the Federal Constitution. The statute made it a misdemeanor for an engineer to operate, *in the state*, a train of cars used for the transportation of persons or freight without first undergoing an examination and obtaining a license from a board appointed by the Governor. The examination involved the character and habits of the applicant. Provision was made for denial or revocation of a license upon certain contingencies appearing.

Smith v. Alabama concerned an engineer whose ordinary run was over the Mobile and Ohio Railroad Company's road between Mobile, Alabama and Corinth, Mississippi. He never handled the engine between points wholly within Alabama. He also operated an engine pulling a passenger train between St. Louis and Mobile. It was contended that the statute contravened the commerce clause of the Federal Constitution.

In disposing of the contention the Supreme Court said:

> "In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied

as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

A statute of Alabama provided for the protection of the travelling public against accidents resulting from color-blindness and defective vision of railroad employees, and to that end required an examination before a state board of any person seeking a position that involved the running or management of a railroad train. Its validity was questioned on the theory that it interfered with interstate commerce in the case of *Nashville, C. & St. L. Ry. v. Alabama*, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

The railway company operated its lines through several states and had as a train conductor one who had not secured a certificate of his fitness in compliance with the Alabama statute. After reaffirming the doctrine enunciated in *Smith v. Alabama*, *supra*, the Supreme Court stated that "[s]uch legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

A state statute prescribing a not unreasonable number for the crews of freight trains "is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been *enacted in aid, not in obstruction, of such commerce* and for the protection of those engaged in such commerce." (Emphasis supplied.) *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290. See *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010.

A state may prescribe regulations for the payment of wages of employees of railway carriers, and so far as such law "affects interstate commerce, it does so indirectly." *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L. Ed 1155, 51 L.R.A.N.S. 1097. A California statute required every "transportation agent" to obtain a license assuring his fitness and to file a bond securing faithful performance of the transportation contracts which he negotiated. Its apparent purpose was to protect the public from fraud and overreaching. In *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, the court held the regulation not to be violative of the commerce clause, saying:

> "As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board*

of Port Wardens, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress."

These decisions evidence the solicitude of the Supreme Court for sustaining the police power of the states in matters relating to certain kinds of contracts, and in particular employment relationships, even though the exercise of such power affects interstate commerce. Citation of these authorities does not pretend to be exhaustive, but it represents a good sampling from which we can deduce validity of the act here under attack. See *Colorado Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

3. Employment contracts are ordinarily of local concern, and controlled by the laws of the state where made. That they have relation to commerce among the states does not necessarily make them vulnerable to attack as being made pursuant to state laws which affect commerce. Legislation regarding contracts, aimed at regulation of rights, duties and liabilities of the contracting parties, is properly within the sphere of state activity, and even though it affects commerce, such impact is deemed indirect and hence valid. Should the federal government clearly preempt the area in which the state has acted, then exclusion of state action takes place.

Early in its history the Supreme Court of the United States stated that generally "the legislation of a State, *not directed against commerce* or any of its regulations, but relating to the *rights, duties*, and liabilities of citizens, and only indirectly and remotely affecting the operations

of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." (Emphasis supplied.) *Sherlock v. Alling, Adm.*, 93 U.S. 99, 23 L.Ed. 19.

The doctrine of *Sherlock v. Alling* has been applied in later cases decided by the federal appellate courts. A resort to Shepard's United States Citations reveals its durability. And the doctrine has been applied to statutes of a state which impose conditions in order to effectuate an employment relationship. *Smith v. Alabama, supra; Nashville, C. & St. L. Ry. v. Alabama, supra; Chicago, R. I. & Pac. Ry. v. Arkansas, supra.* See *Richmond & Allegheny R.R. v. Tobacco Co.*, 169 U.S. 311, 18 S.Ct. 335, 42 L.Ed. 759; *Chicago, M. & St. P. Ry. v. Solan*, 169 U.S. 133, 18 S.Ct. 289, 42 L.Ed. 688. Last approved in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed. (2d) 852.

In *Smith v. Alabama, supra*, the court was dealing with state required examination and licensing of locomotive engineers. In holding the state legislation valid and inoffensive to the commerce clause, the court expressly made applicable the above language quoted from *Sherlock v. Alling, supra.* The sanction of the opinion extended to "regulating the *relative rights and duties* of persons within the jurisdiction of the State, *and operating on them*, even when engaged in the business of interstate commerce." (Emphasis supplied.)

Rights and duties settled by contract afford grounds for state intervention where the state can with propriety establish a public policy regarding them. Particularly is

this true in relation to employment contracts — indeed, this has been a fertile field in recent years for the ordination of policy measures. Here personal relations are fundamental, and the greater the skill required of the employee, the greater is the personal element involved.

A contract is a juridicially recognized engagement between persons by which their rights and duties concerning a subject matter are established. *Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629. Ordinarily, juridical recognition is a matter of domestic concern. And, as already noted, the policy of the state may be exerted to require certain conditions in making the engagement before it shall have a binding effect upon the parties.

Rights and duties imposed by the parties upon themselves by agreement are pivotal concepts; to the Supreme Court they have significance in determining whether a matter presented to it indicates an intrusion on commerce. If legislation of the state is patently and essentially concerned with the rights and duties of persons, inter se, and said legislation in particular cases has an incidental or adventitious impingement on commerce among the states, the Supreme Court seems inclined to hold it related to a localized activity, and its influence on commerce not measurably significant.

All the elements necessary to the application of this doctrine are here present. Green is a qualified applicant for a position requiring special skills. A contract between Continental and Green would involve these skills, and hence the personal element creating a special, individual-to-individual relationship with rights and duties pervading

it. The generality of the anti-discrimination law, evidently directed to employment generally, without intent to burden commerce, when brought into perspective with the immediate problem of hiring a person with special skills, leaves us with a law innoxious to interstate commerce.

4. The Colorado Anti-Discrimination Act is in aid of, and not a burden on, commerce. States may not deny persons within their jurisdictions the equal protection of the laws. U.S. Const., XIV Amend. May that which the states are prohibited from doing become the subject of harmonious, positive legislation by the states? May the states provide for equal treatment of persons within their jurisdictions by legislation? If they may, does the fact that commerce may be incidentally affected, invalidate such legislation?

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from *unfriendly legislation* against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race." (Emphasis supplied.) *Strauder v. West Virginia*, 100 U. S. 303, 25 L.Ed. 664. It would appear that *friendly legislation* is implicitly invited.

State laws having local aspects "are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress

has not legislated upon the particular subject, they are rather to be regarded as *legislation in aid of commerce*, and as a rightful exercise of the police power of the State *to regulate the relative rights and duties of all persons and corporations within its limits*." (Emphasis supplied.) *Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 24 S.Ct. 132, 46 L.Ed. 268. *Richmond & Allegheny R.R. v. Tobacco Co., supra; Chicago, M. & St. P. Ry. v. Solan, supra; Mobile County v. Kimball*, 102 U.S. 691, 26 L.Ed. 238.

So long as the federal government has not made clear its intent to act exclusively in the regulation of an area of commerce, the nation and the state may march hand in hand concerning it in advancing parallel policies against discrimination based on race, creed or color. *Bob-lo Excursion Co. v. Michigan, supra.* In a footnote of the opinion the court says, "The direction of national policy is clearly in accord with Michigan policy."

5. Colorado has activated the prohibitions of the Federal 14th Amendment by enacting a law forbidding discrimination in employment based on race, creed, color, national origin or ancestry. Under the 14th Amendment a person has a *federal right* not to be discriminated against by the state on the basis of race, color, creed or national origin; under the Colorado statute the state creates a similar right running against such discrimination by anyone, including a private party. What was a federal right thus becomes a broadened state right by virtue of the statute. See Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L. Quar. 375.

The 14th Amendment is directed against discrimina-

tory state action; the Colorado Anti-Discrimination Act is state action, but consistent with, although having a broader base than, the 14th Amendment. See *Bob-lo Excursion Co. v. Michigan, supra. Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718, 21 Am.S.R. 576, 9 L.R.A. 589, indicates that state laws putting "the colored citizen upon an equal footing in all respects with the white citizen" is nothing more than the declaration by the states of what the Federal Constitution ordains.

Contention was made in *Railway Mail Ass'n v. Corsi, supra*, that the New York Civil Rights Law offended the due process clause of the 14th Amendment. It seems to me that the answer of the Supreme Court is a manifestation of a view which would hold the Colorado act valid, as making effectual by state action in an affirmative way the 14th Amendment. The court said:

> "* * * We have here a prohibition of discrimination in membership or union services on account of race, creed, or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees."

Since it is seriously doubted whether the federal government has assumed exclusive control of the employment

in question, we should heed these words in the decision of *Railway Mail Ass'n v. Corsi, supra*:

> "This provision can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. *Congress must clearly manifest an intention to regulate for itself* activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless." (Emphasis supplied.)

No such clear manifestation appears in this case.

In the course of this opinion I have accepted as fact that the Anti-Discrimination Act will on occasion exert an influence on commerce among the states. The act was designed to accomplish a purpose wholly within the letter and spirit of the 14th Amendment, and contains no exception as to employment involving duties requiring movement between states. In this respect interstate commerce will be affected, but not detrimentally. How can it be contended that state action which is obedient to the 14th Amendment does anything other than aid commerce?

Had the federal government clearly acted against discrimination in manner showing that preemption had taken place, the state would have no authority to act. But, as Justice Doyle demonstrated in his specially concurring opinion in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., supra*, no federal preemption has been effected.

MR. JUSTICE McWILLIAMS authorizes me to say that he concurs in this dissent.

Appendix B

BEFORE THE
COLORADO ANTI-DISCRIMINATION COMMISSION
655 Broadway
Denver 3, Colorado

No. 25

Marlon D. Green,
Complainant,
vs.
Continental Airlines, Inc.
Respondent.

For complaint against the Respondent above named, Complainant alleges:

1. That Respondent, Continental Airlines, Inc., a private employer, whose address is Stapleton Airfield, Denver, Colorado, and who is engaged in the business of operating a commercial airline, has violated the Colorado Anti-Discrimination Act of 1957 in the following respects:

2. That on or about July 8, 1957, Respondent refused to employ Complainant as a commercial airline pilot because he is a Negro.

3. That Respondent failed to advise Complainant as to the action taken on his application for employment

within the ten-day period of time between June 26, 1957, the completion date of interviews and flight tests, and July 5, 1957, as promised.

4. That Respondent's Application for Employment form contains at least two specifications prohibited by the Colorado Anti-Discrimination Act of 1957, viz., attachment of photograph and applicant's race.

WHEREFORE, the Complainant requests the Colorado Anti-Discrimination Commission to use whatever powers are at its command to eliminate the foregoing alleged discriminatory or unfair employment practices; and for such other and further relief as may be within the Commission's jurisdiction.

Complainant's address:

913 Nipp Street
Lansing, Michigan

/s/ Marlon D. Green
Marlon D. Green, Complainant

Subscribed and sworn to before me this 13th day of Aug. 1957, by Marlon D. Green.

My commission expires March 8, 1958

/s/ H. Marie Brower
Notary Public

(Seal) Notary Stamp

Appendix C

BEFORE THE
COLORADO ANTI-DISCRIMINATION COMMISSION
OF THE STATE OF COLORADO

No. 25

Marlon D. Green,
Complainant,

vs.

Continental Airlines, Inc.
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW and *ORDERS*

RE GREEN, COMPLAINANT V. CONTINENTAL AIR LINES, INC., RESPONDENT.

The Complainant alleges a violation of the Colorado Anti-Discrimination Act of 1957, basically in the allegation that the Respondent refused to employ the Complainant as a commercial air line pilot because he is a Negro. The Respondent denies that it has violated the Act. It questions the jurisdiction of this Commission and the constitutionality of the Act.

The Complainant is a resident of 608 North Logan, Lansing, Michigan and is presently engaged as the Department Pilot for the Michigan State Highway Department.

The Respondent is a duly authorized and certificated

commercial carrier by air and maintains an office at Stapleton Airfield, Denver, Colorado.

Complainant filed application for employment as a pilot with the Respondent on April 30, 1957; the application contained a request for two photographs of head and shoulders not over 1½ x 2½ inches taken within the last 12 months and which application also had a space for racial identity.

At the time Complainant made application for employment with Respondent, he was a rated pilot so designated by the U. S. Air Force, as of 24 March 1951.

Complainant during his military career had flown the T-6 Trainer, the B-25, the B-29, the B-26, the 5A-16, the C-45 or Twin Beach, the C-97 and C-47.

The Complainant as of June 26, 1957 had logged 3,071 hours flying time as evidenced by Air Force Form 5, on file with the Director of Flight Safety Research, Norton Air Force Base, California.

Complainant's rank when discharged from the Air Force was that of Captain.

Complainant arrived in Denver, June 24, 1957 for employment interview with Respondent.

Complainant was directed by Captain Cramp to the link trailer department for a check ride in the link trainer.

On the following day Complainant took a flight check with Captain Cramp and after the flight check, was advised that he could return to Lansing, expecting the reply from Respondent in about ten days.

Complainant was not selected for the July training class; Complainant's application was kept in a file of eli-

gible checked out-pilots. He was still retained as an eligible candidate for pilot position. It was admitted that he was a good pilot and met Respondent's minimum qualifications.

Complainant's application was withdrawn from further consideration in the early part of August because Respondent was made aware of some publicity appearing in the Albuquerque Journal of August 4.

The Respondent is guilty of a discriminatory and unfair employment practice in requiring on its application form, the racial identity of the applicant and the requirement of a photo to be attached to the application, each of which is contrary to regulations adopted by this Commission under Section 4, sub-section 2 of Chapter 176, Session Laws of 1957, also known as the Colorado Anti-Discrimination Act of 1957.

From the applications submitted to the Commission for review, we find: —

Applicant, Marlon D. Green with a total of 3,071:30 flying hours with multi-engine equipment.

Applicant No. 2 with a total of 1,150 flying hours.

Applicant No. 3 with a total of 1,000 flying hours in single engine equipment, mostly jet.

Applicant No. 4 with a total of 2,100:53 flying hours.

Applicant No. 5 with a total of 1200 flying hours, in multi-engine equipment.

Applicant No. 6 with a total of 1031 flying hours in single engine equipment.

Based on a review of the applications for employment

of the several persons interviewed at the time Mr. Green was interviewed, it appears that Complainant had more flying hours than any other applicant and was better qualified for the position of co-pilot than any applicant interviewed, but was not hired because of the discriminatory act of Respondent.

In spite of the fact that the Respondent properly asserts that this position is an extremely important one, dealing with human lives as it does, the evidence does not show that the Respondent exercised extreme care in the selection of the applicants for the training school; on the contrary it was difficult, if not impossible to determine from the Respondent's testimony, although the witnesses were asked repeatedly, who was charged with the selection of the successful applicants. The evidence is conclusive on the basis of the testimony that the only reason that the Complainant was not selected for the training school was because of his race.

CONCLUSIONS OF LAW

The Commission assumes constitutionality of the law.

The Commission has jurisdiction to hear the complaint.

The Commission finds that there is a violation as charged in the complaint.

ORDERS

The Complainant has requested this Commission to withdraw his complaint. Rule 2 (j) of the Rules of the Commission provides with respect to withdrawal as follows: "* * * if the request for withdrawal is made after the case has been noted for hearing the written consent of a majority of the hearing examiners shall be obtained."

A majority of the hearing examiners have not consented to such withdrawal. Accordingly it is hereby ordered as follows:

The Respondent shall cease and desist from such discriminatory and unfair employment practice.

The Respondent shall give to the Complainant the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957.

In view of Complainant's request that his complaint herein be withdrawn, he is directed to advise this Commission in writing on or before January 10, 1959 of his willingness to enter the next pilot training course to be conducted by Respondent. In the event of Complainant's failure so to do the Respondent will be released of the obligation of the order entered herein to place him in such class. In the event Complainant elects within the time mentioned to enter such class, the Commission shall advise the Respondent of such election and thereupon such written advice to the Respondent shall be deemed the service of an order of the Commission pursuant to Section 6 of the Act, and Respondent shall be allowed thirty (30) days from the service of such order in which to file its statutory petition for review in the district court under the provisions of Section 7 of the Act.

The Commission retains jurisdiction of the matter under the provisions of the Act.

BY ORDER OF THE COMMISSION

s/ Roy M. Chapman
Coordinator

(Seal)

Appendix D

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC., Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION COMMISSION, and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, Commissioners of said Commission, and MARLON D. GREEN, Respondents.

FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

This matter coming on for review of the proceedings and Order of the Colorado Anti-Discrimination Commission in the matter of Marlon D. Green, Complainant vs. Continental Air Lines, Inc., Respondent, and the Court having reviewed the record, and having heard arguments of counsel, and having read the briefs of Mr. T. Raber Taylor, for Marlon D. Green, Complainant, Mr. Charles S. Thomas, for the Commission, and Messrs. Patrick M. Westfeldt, Mr. William C. McClearn, and Mr. Warren L. Tomlinson, of Holland & Hart, for Continental Air Lines, Inc.,

DOTH FIND:

That the Complainant, Marlon D. Green, filed a com-

plaint against Continental Airlines, Inc., on August 13, 1957, alleging, in substance, as follows:

1. That Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a negro;

2. That Continental failed to notify him as to their acceptance or rejection of his application as an airplane pilot within 10 days, as promised; and

3. That Continental violated the Act because its forms contain at least two specifications prohibited by the Colorado Anti-Discrimination Act, vis.; attachment of photograph and requiring applicant to state his race.

The Commission, after a hearing, entered the following Order:

"• • • • •

The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

Continental Airlines appealed from the ruling on several grounds, which the Court will hereinafter review.

The Colorado Legislature, in 1937, enacted the following law:

"1953 — C.S.A. 5-1-1: SHORT TITLE: This article is known and may be cited as 'The Aeronautics Act of 1937'."

"5-1-2 NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform

regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

" • • • • •

"5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

This Court must recognize that as early as 1937, the Colorado legislature recognized federal laws and regulations on the subject of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides:

"* * * * *

"(5) 'Employer' shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * * * *."

It will be thus seen, from the above provision, that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce.

The evidence showed the Complainant, Green, received "an application blank" from Continental Airlines in San Francisco, at which time he was a citizen of Arkansas; he was interviewed in Denver; at the time he made a complaint, namely, August 13, 1957, he was a resident of the State of Michigan (folio 1), and he was not a licensed pilot under the federal law, nor under the Colorado Aeronautical Act, and did not become one until September 27, 1957 (folio 16), at which time he gave his residence as 734 South Smith Avenue, El Dorado, Arkansas.

It further appears that Green had filed complaints against United Airlines for unfair labor practices in the States of Washington, New York and the District of Columbia. In Michigan, he filed similar complaints against General Motors, Francis Aviation, and Abrams Aerial Survey Corporation. In Washington, D.C., Green filed similar complaints with the President's Committee on Gov-

ernment Contracts against Capital Airlines and the Air Division of General Motors.

This Court has not been advised of the disposition of these complaints; nor is it important that it has not been so advised.

Continental Airline's first and second claims for relief, which attack the jurisdiction of the Commission and raise a constitutional issue, are directed to the same basic legal issue and may properly be considered together. The facts upon which this issue is predicated were the subject of a Court-approved stipulation between the parties and are as follows:

Continental is a commercial carrier by air, operating pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. It provides air transportation for passengers, freight and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce and it was further agreed that the position with Continental for which Respondent, Green, applied involved interstate operations. At the time of the hearing before the Commission, Continental employed approximately 220 pilots, of whom 90 to 95 were based in Denver. The other pilots were stationed in Texas. Notwithstanding these facts, the Commission asserted jurisdiction to hear and determine Respondent Green's complaint against Continental.

The constitutional issue presented in this case is not whether the State of Colorado had the general authority, pursuant to its police power, to enact the Colorado Anti-Discrimination Act. The question is whether the Act may

legally be applied to the interstate operations of Continental involved in this proceeding.

Continental maintains that the Act, as applied to it on the facts of this case, is unconstitutional and void under the provisions of Article I, Section 8, Clause 3, of the United States Constitution, which reads as follows:

> "The Congress shall have power . . . (Clause 3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes; * * *"

Continental further contends that the United States Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (both generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The applicable rules of law on the constitutional issues are:

> (a) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and
>
> (b) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are of peculiar local concern, whenever Congress does, by legislation, occupy the field, the states are thereafter without power to act.

In either (a) or (b) above, an attempt by a state to

act is unconstitutional as a violation of the commerce clause of the United States Constitution and attempts of state agencies to apply such statutes are void and of no force and effect.

Congress has the power to regulate interstate commerce. *Article 1, Section 8, Clause 3, United States Constitution.* Early in the history of this country, the United States Supreme Court held that the power of Congress to regulate interstate commerce was supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons vs. Ogden,* 9 Wheat. 1, 196, 6 L.Ed. 23, 70 (1824). This rule has never been altered and is today fully applicable.

The power of the Congress over interstate commerce does not mean that the States are completely without power to legislate in that field. In another early case, the United States Supreme Court held that in the absence of federal legislation regulating a particular area of commerce, the States could legislate on matters of peculiar local concern if the impact on interstate commerce did not interfere with the operation of that commerce. *Cooley vs. Port Wardens of Philadelphia,* 12 How. 299, 13 L.Ed. 996 (1851). However, even when the Congress has not acted, States may not regulate matters which, because of their nature, require national uniform treatment. *Southern Pacific Co. vs. Arizona,* 325 U.S. 761, 65 S.Ct. 1515 (1945).

These rules were expressed as follows by the United States Supreme Court in the *Minnesota Rate Cases,* 230 U.S. 352, 33 S.Ct. 729 (1913):

> "The grant in the Constitution of its own force, that is, without action by Congress, established the essen-

tial immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has been repeatedly declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." 33 S.Ct. at 740.

Although Congress has legislated extensively in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states, the Court will first consider whether racial discrimination by an interstate carrier is a subject which (a) must be free from diverse regulation by the several states and governed uniformly, if at all, by Congress, or (b) whether it is a matter of primarily local concern upon which the states can legislate until, but not after, Congress acts. The United States Supreme Court has clearly and directly ruled that this is a matter permitting only national action. Attempts by states either (a) to impose discrimination on account of race, or (b) prohibit such discrimination, have been held unconstitutional as applied to interstate carriers.

In *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (1877), the court had before it a Louisiana statute which prohib-

ited discrimination in passenger accommodations within the state. The defenadnt, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accommodations to a Negro and was sued by her. The Court concluded that the statute as applied to those engaged in the transportation of passengers among the States was unconstitutional. The Court said:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. • • •
>
> "It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship.

Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the River or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

The soundness of *Hall vs. DeCuir* was expressly reaffirmed by the United States Supreme Court in 1946. *Morgan vs. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1946). Here a Virginia statute required segregation of white and colored passengers for both intra-state and interstate motor vehicle carriers. A negro passenger making an interstate trip challenged the validity of the statute as a burden on interstate commerce. The Court found that the statute, as applied to interstate carriers, was unconstitutional. The Court reaffirmed the doctrine of *Hall vs. DeCuir* in the following language:

"The factual situation set out in preceding para-

graphs emphasizes the soundness of this court's early conclusion in *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 66 S.Ct. at 1057.

In conclusion, the Court said:

"It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid." 66 S.Ct. at 1058.

Mr. Justice Frankfurter, concurring in the Court's decision, stated:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, is controlling. Since it was decided nearly 70 years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the court.

"The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial commingling or racial segregation." 66 S.Ct. at 1059.

The rule first set forth in *Hall vs. DeCuir* and reaffirmed in *Morgan vs. Virginia*, namely, that state regulation of the racial policies of interstate carriers constitutes a burden on interstate commerce because this area demands a "single, uniform rule to promote and protect national travel" has been often approved and applied. For example, in *Chance vs. Lambeth*, 186 F.2nd 879 (4th Cir. 1951), the Court held a regulation which required

segregation of interstate passengers on a railroad to be unconstitutional because it imposed a burden on interstate commerce. The Court said:

> "In *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, the court held that a statute of Louisiana which required a carrier to give all persons traveling within the state upon public vehicles equal rights and privileges was an unconstitutional regulation of interstate commerce since otherwise each state would be at liberty to regulate the conduct of carriers while in its jurisdiction, resulting in great confusion and inconvenience and destroying the uniformity necessary to the operation of the carrier's business." 186 F.2d at 881.

Also following the rule of *Hall vs. DeCuir* and *Morgan vs. Virginia* are *Charles vs. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951); *Whiteside vs. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *William vs. Carolina Coach Co.*, 111 F.Supp. 329 (E.D.Va. 1952), aff'd 207 F.2d 408 (4th Cir. 1953).

In *Pryce vs. Swedish-American Lines*, 30 F. Supp. 371 (S.D.N.Y. 1939), plaintiff brought an action for damages against defendant shipline, alleging that it discriminated against her because of her color in violation of the New York civil rights law "while she was a passenger on defendant's vessel on a cruise from New York City to various South American ports and return." Defendant was a Swedish corporation and the vessel involved was under Swedish registry.

As one of two grounds for dismissing plaintiff's complaint, the Court said:

"There is, however, an even more compelling reason

for refusing to apply Sections 40 and 41 of New York Civil Rights Law to the facts set forth in the second cause of action. To do so, would in effect be construing the statute as forbidding discrimination between passengers on the part of common carriers engaged in commerce between the port of New York and foreign ports. If construed in such a manner, the statute undoubtedly would illegally interfere with foreign commerce. See *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 30 F.Supp. at 372.

The *Pryce* case is a clear holding that to apply a state law forbidding racial discrimination to interstate or foreign commerce constitutes an unlawful interference with that commerce.

The important point is that the foregoing cases stand for the proposition that the question of racial discrimination by interstate carriers is, in and of itself, of such a nature that uniform regulation by a single authority is required. The burden on commerce lies in subjecting interstate carriers to the law-making powers of the legislatures in the several states through which such carriers move. The foregoing cases and others show the practical obstructions and burdens that result from such diversity of regulatory power. The diversity of this regulatory power is the burden on interstate commerce which is unconstitutional.

All of the states of the United States are sovereign within constitutional limits. What any particular state law is today or what it may be tomorrow, and whether or not any one or more of such states have any laws on the subject is of no significance. If an interstate carrier is subject to the regulatory power of all of the states through

which it passes, it is automatically subject to non-uniform regulation. Such non-uniform regulation is what the United States Supreme Court has held to be barred by the commerce clause.

Respondent, Green, relies principally upon two cases, which the Court will discuss.

In *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358 (1948), a conviction under a Michigan civil rights statute was upheld. Defendant had refused to permit a Negro on its excursion boat which traveled between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any way other than on defendant's excursion boat. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency. Based upon these facts it was held that defendant's conviction under the Michigan statute did not violate the commerce clause in the United States Constitution. But the Court carefully limited its holding to the unusual facts before it, saying, in part:

> "Of course, we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safeguarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substan-

tial business touching foreign soil or more highly local concern." 68 S.Ct. at 361-62.

In addition, the Court took pains to carefully distinguish the unique *Bob-lo* situation from the doctrine established by the *Morgan* and *Hall* cases. It said:

"Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, supplemented by *Morgan vs. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, 165 A.L.R. 574, and *Pryce vs. Swedish-American Lines*, D.C., 30 F.Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating affects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignities. None involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The Pryce case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the Mississippi River, such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's

highly localized business, and those decisions are not relevant here." 68 S.Ct. at 363-364.

It is thus quite clear that the U. S. Supreme Court did not intend to detract from nor diminish the doctrine of *Morgan* and *Hall*. It is equally apparent that the facts in the present case, involving frequent high-speed air transportation between eight states pursuant to certification from the Civil Aeronautics Board, are much more akin to the transportation involved in *Morgan* and *Hall* than to the highly local, non-commercial traffic with which *Bob-lo* was concerned.

During oral argument before this Court, Respondent, Green, indicated primary reliance upon *Railway Mail Association vs. Corsi*, 326 U.S. 88, 65 S.Ct. 1483 (1945). The *Corsi* case did not in any way involve the commerce clause of the U. S. Constitution. *Corsi*, interpreted most favorably to Respondents, only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided.

There is perhaps less permissible state regulation of interstate transportation than any other area of commerce. The characteristics of interstate transportation, namely, definite, regular and frequent contacts with numerous states, require that many aspects of interstate transportation be left free from state regulation. The speed and complexity of long-distance air transportation renders it even less susceptible to state regulation than the river

boat travel involved in *Hall vs. DeCuir*, or the motor vehicle transportation in *Morgan vs. Virginia*.

The foregoing cases hold that the states may not regulate the racial policies of the interstate operations of carriers, and they are consistent with a body of law regulating interstate commerce which has been developed and uniformly applied for nearly 150 years.

In *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), the Supreme Court declared unconstitutional the Arizona Train Limit Law which prescribed the maximum number of passenger and freight cars for trains operating in the state. The Court reiterated familiar rules when it said:

> "But ever since *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." 65 S.Ct. at 1519.

In holding the law unconstitutional, the Court said:

> "Enforcement of the law of Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter

> each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." 65 S.Ct. at 1522.

The Court clearly recognized that the Arizona law would of necessity affect operations in other states when it said:

> "The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and before leaving the regulating state." 65 S.Ct. at 1523.

In *Southern Pacific Co. vs. Marie Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), the Supreme Court held that New York Workmen's Compensation Laws could not be applied to stevedores working in the maritime industry. The Court drew a parallel between federal power over maritime matters and federal power over interstate transportation, referring to the latter in the following language:

> "A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national' in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration

that commerce in that matter shall be free." 37 S. Ct. 529.

Many state attempts to regulate interstate transportation operations have been struck down by the United States Supreme Court. A state statute requiring the use of a contour type of rear fender mudguard on interstate trucks conflicted with the commerce clause and was unconstitutional. *Bibb vs. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959). A state statute requiring interstate trains to greatly reduce their speed at grade crossings was found to be a burden on interstate commerce. *Seaboard Air Line Railway Co. vs. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917). A state was without constitutional power to order a railroad to remove bridges over which its interstate trains passed even though the bridge removal was a part of the State's flood control program. *Kansas City Southern Rwy. Co. vs. Kaw Valley Drainage District*, 233 U.S. 75, 34 S. Ct. 564 (1914). Burdensome intrastate stops by interstate trains cannot be demanded. *Herndon vs. Chicago, Rock Island & Pacific Rwy. Co.*, 218 U.S. 135, 30 S.Ct. 633 (1910); *St. Louis-San Francisco Rwy. Co. vs. Public Service Commission*, 261 U.S. 369, 43 S.Ct. 380 (1923). A state may not require that interstate trains leave their scheduled stops on time. *Missouri, K. & T. Railway Co. vs. Texas*, 245 U.S. 484, 38 S.Ct. 178 (1918). And a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states was invalid. *South Covington and Cincinnati Street Railway Co. vs. Covington*, 235 U.S. 537, 35 S.Ct. 158 (1915). In this case, the Court said:

"If Covington (a city in Kentucky) can regulate these

matters, then certainly Cincinnati (in Ohio) can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall vs. DeCuir*, 95 U.S. 485, 489, 24 L.Ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments.' " 35 S.Ct. at 161.

Thus, an unbroken line of United States Supreme Court cases over a period of nearly 150 years has established that the national power over interstate commerce is supreme and plenary; that even when Congress has not acted the states will not be permitted to regulate this commerce in areas in which a uniform rule is needed because diversity of regulatory power creates an unconstitutional burden, that the racial policies pertaining to the interstate operations of carriers is an area in which a uniform rule is needed and only Congress can legislate, and that this, among many other aspects of interstate transportation, must remain free from regulation by the states.

Congress has regulated the activity involved in this case and thereby pre-empted the field, leaving the state without authority to act. The applicable rules concerning pre-emption are set forth in *Kelly vs. State of Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937):

> "The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government.
>
> . . .

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where states may act in the absence of federal action but where there has been federal action governing the same subject." 58 S.Ct. at 91.

The Court stated that the doctrine of pre-emption is not applicable where there is a direct conflict between state law and federal law. In such a case the federal law is the supreme law of the land. In addition, the Court in the *Kelly* case pointed out that the pre-emption rule is inapplicable if the subject is one demanding uniformity of regulation.

By virtue of any one of several federal statutes and regulatory systems, an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field.

The Railway Labor Act prohibits racial discrimination. The Railway Labor Act (45 U.S.C.A. Sections 151, et seq.) hereinafter referred to as the R.L.A.), which was extended to cover interstate air carriers by a 1936 amendment (45 U.S.C.A., Sections 181, et seq.), is a comprehensive federal statute prescribing the duties of interstate air carriers with respect to their employees. There is no

specific, detailed section of the R.L.A. which specifically treats the matter of racial discrimination. However, the United States Supreme Court has considered the provisions of the R.L.A. and has clearly held that racial discrimination by employers subject thereto is forbidden.

The latest pronouncement by the Supreme Court on this point came in *Conley vs. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Petitioners were Negro railway employees who contended that the union had failed to represent them equally and in good faith and had failed to protect them from unjustified discharge and loss of seniority. The Court expressed its interpretation of the statute in clear terms in the opening words of its opinion:

> "Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele vs. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination." 78 S.Ct. at 100.

The Court went on to say:

> "Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad, and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there

> has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act." 78 S. Ct. at 102.

In *Steele vs. Louisville & Nashville RR.*, 323 U.S. 192, 65 S.Ct. 226 (1944), referred to above as the leading case in this field, the Court said:

> "We think that the Railway Labor Act impose upon the statutory representative of the craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates . . . We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of the craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

See also *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S.Ct. 235 (1944); *Graham vs. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 70 S.Ct. 14 (1949).

The scope of these holdings by the Supreme Court is made clear by *Brotherhood of Railroad Trainmen vs. Howard*, 343 U.S. 768, 72 S.Ct. 1022 (1952). Whereas in the *Steele* case the Nego petitioners had admittedly been members of the craft (locomotive firemen) but had not

been members of the union (because membership was denied to them on account of race), in *Howard* "the colored employees had for many years been treated by the carriers and the Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing." 72 S.Ct. at 1025. However, it was alleged that the Brotherhood, under a threat of strike action, forced the employer to enter into a collective bargaining agreement which would have the inevitable result of abolishing the Negroes' jobs and replacing them with Brotherhood members. By this action the union was in effect forcing the employer, an interstate rail carrier, to discriminate against Negro porters in the tenure of their employment. This is exactly the same field of law covered by the Colorado Act. The U.S. Supreme Court brushed aside the plea to restrict its earlier holdings to instances of discrimination by the union against members of the class it represented with the following language:

> "Since the Brotherhood has discriminated against 'train porters' instead of minority members of its own 'craft', it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the Steele case points to a breach of statutory duty by this Brotherhood.
>
> "As previously noted, these train porters are threatened with the loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement: their color alone would disqualify them for the

> old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele case 'discriminations based on race alone are obviously irrelevant and invidious.'" 72 S.Ct. at 1025.

And finally the Court held that the employer as well as the union was subject to the duty and obligation to treat its employees without discrimination based on race by permanently enjoining the railroad as well as the union from using the contract or any other device to oust the Negro porters from their jobs. This portion of the Court's opinion reads:

> "On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." 72 S.Ct. at 1026.

It is, of course, not material that the public policy or objectives behind both the federal and the Colorado legislation are similar. As stated by Mr. Justice Holmes, speaking for the Court in *Charleston & Western Carolina Ry. vs. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915):

> "When Congress has taken the particular subject matter in hand, coincidence (of state regulation) is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 35 S.Ct. at 717.

See also *Wabash Railway Co. vs. Illinois*, 118 U.S. 557, 7 S.Ct. 4 (1886), where a state's attempt to prevent discriminatory railway rates was struck down because it was

a subject of "general and national character", even though federal regulation would not sanction discriminatory railway rates either.

In summary, the Supreme Court decisions over a number of years require nondiscriminatory representation by labor unions. In addition, the Supreme Court in the *Howard* case clearly held that the R.L.A. requires the same nondiscriminatory treatment by an interstate rail carrier employer with respect to its employees. Hence, the R.L.A., as interpreted by the United States Supreme Court, occupies the field of law relating to discrimination in matters of employment by interstate rail and air carriers.

Such pre-emption necessarily precludes any attempt by Colorado, as in the instant case, to extend its regulatory activities in the field to the interstate operation of an air carrier.

The Civil Aeronautics Act prohibits racial discrimination. Not only has the field of racial discrimination by interstate air carriers been pre-empted by the R.L.A., but it is also covered by the Civil Aeronautics Act, hereinafter referred to as the C.A.A., 49 U.S.C.A. Sections 401, et seq. It should be noted that in 1958, the C.A.A. was repealed and replaced with a new statute known as the Federal Aviation Program Act, hereinafter referred to as the F.A.P.A., 49 U.S.C.A. (Supp.) Sections 1301, et seq. However, the effective date of the F.A.P.A., insofar as it supersedes the earlier provisions of the C.A.A. applicable to this case, was not earlier than December 31, 1958. (See annotation following 49 U.S.C.A. (Supp.) Section 1301.) Respondent Green's complaint against Continental, which was filed with the Commission on or about August 13,

1957, referred to acts which allegedly occurred in June and July of 1957. As a consequence, the C.A.A. and not the F.A.P.A. was in effect during all times material to this action.

The Civil Aeronautics Act regulates practically every phase of an interstate air carrier's operations. The public policy of this act is set forth in the broadest terms. 49 U.S.C.A. Section 402. Extensive control is exercised over flight crew personnel. 49 U.S.C.A. Sections 551-560. Such employees are licensed or certified by the Civil Aeronautics Board, and that Board may under certain circumstances revoke or suspend certificates or licenses. The disciplinary power of the Board over flight crew personnel is very broad. For instance, the Civil Aeronautics Board has the power to suspend or revoke pilots' certificates for bad judgment even though the pilot violated no statute, rule or regulation. *Hard vs. CAB*, 248 F.2d 761 (7th Cir. 1957); *Wilson vs. CAB*, 244 F.2d 773 (D.C. App. 1957). The statute delegates extensive power to the Board, including the power to conduct investigations and issue orders, rules and regulations. 49 U.S.C.A. Section 425. Pursuant to that power, the Board regularly issues orders and has promulgated a large volume of rules and regulations touching practically all phases of interstate air carriage. 14 Code Fed. Regs.

The "intensive and exclusive" control of the Federal Government over air commerce was discussed by the United States Supreme Court in *Northwest Airlines, Inc. vs. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). The following language from the concurring opinion of Mr. Justice Jackson is particularly illuminating:

"Congress has recognized the national responsibility

for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certificated personnel and under an intricate system of federal commands." 64 S.Ct. at 956.

In *Allegheny Airlines, Inc. vs. Village of Cedarhurst*, 132 F.Supp. 871 (E.D.N.Y. 1955), the Court had before it the specific contention that the federal statutes had pre-empted one aspect of air commerce. The Village of Cedarhurst, located near Idlewild Airport in New York, enacted an ordinance prohibiting air flights above the city at an altitude of less than 1,000 feet. In holding the Cedarhurst ordinance unconstitutional, the Court said:

"The plaintiffs' contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute pre-emption in that field is upheld. The States, including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation." 132 F.Supp. at 881.

In *Fitzgerald vs. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956), the plaintiffs alleged that they were denied first-class passage on one of defendant's airplanes because of their race and that such conduct violated the Civil Aeronautics Act, 49 U.S.C.A. Section 484 (b), which provided in part as follows:

"No air carrier . . . shall . . . subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any

undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court held that this section prohibited racial discrimination by interstate air carriers and that it created an actionable civil right for the vindication of which the person harmed could bring a federal court action. The Court said:

> "Although we regard it as not controlling, we note also the following: *Congress sought uniformity in the practices of those subject to this Act.* It is by no means clear that, in all states and territories, the common-law rules would render unlawful racial differentiations in accord with the 'separate but equal doctrine,' whereas, in the light of recent Supreme Court decisions, we must construe Section 484(b) so that that doctrine will not apply." 299 F.2d at 502.

The language underlined in the last quoted portion of the *Fitzgerald* case shows that Congress considered uniformity in practices of interstate air carriers to be necessary. This is in effect both a legislative and judicial interpretation to the effect that uniform rather than diverse regulation is necessary.

The *Fitzgerald* case is also a clear holding that racial discrimination in interstates air commerce is prohibited by federal law. Although the case itself involved discrimination against a passenger, there can be no doubt that the same rule would apply to discrimination in matters of employment. The statute condemns "unjust discrimination" against "any . . . person" by an air carrier. "Person" certainly includes employees. Moreover, a subsequent case approved the broad interpretation which was given to section 484(b) by the Court in the Fitzgerald

case. Judge Lumbard, concurring in *Spirit vs. Bechtel*, 232 F.2d 241 (2d Cir. 1956), made the following comments:

> "The authorities cited by our dissenting colleague are not in point, it seems to me, because in those cases there was good reason to believe, and this court found, that Congress was enacting legislation for the benefit of a class. The court therefore concluded that the right of a member of the protected class to bring a civil suit should flow from the legislation. A clear case of this is our recent decisions in Fitzgerald vs. Pan American World Airways, Inc., 229 F.2d 499. We were there concerned with 49 U.S.C.A. Sec. 484(b) which protects against unjust discrimination by air carriers. The plaintiffs were persons allegedly harmed by unjust discrimination and were clearly within a class which Congress sought to protect." 232 F.2d at 250.

In interpreting the Interstate Commerce Act, which contains language practically identical to the portion of the C.A.A. discussed in the *Fitzgerald* case, the U. S. Supreme Court, in *Mitchell vs. United States*, 313 U.S. 80, 61 S.Ct. 873 (1941), stated among other things, as follows:

> "We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (Citations omitted.) Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to sub-

> ject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U.S.C. Section 3, 49 U.S.C.A. Section 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. 61 S.Ct. at 877.

There are other reasons why it can only be concluded that the federal aeronautics statutes prohibit racial discrimination by interstate air carriers and therefore leave the states without authority to act in this field. The section setting forth the declaration of policy in the federal statute reads in material part as follows:

> "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity —
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> • • •
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> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;" 49 U.S.C.A. Section 402.

If anything, this section, which sets forth the objectives which Congress sought to achieve by the Act, is even more

specific than the section held in the *Fitzgerald* case to prohibit racial discrimination.

In addition, as noted earlier herein, the original Civil Aeronautics Act was repealed and re-enacted, with amendments, as the Federal Aviation Program Act. 49 U.S.C.A. (Supp.) Sections 1301, et seq. The section held in the *Fitzgerald* case to prohibit racial discrimination by interstate air carriers (49 U.S.C.A. Section 484(b)) was re-enacted without one word being changed. 49 U.S.C.A. (Supp.) Section 1374(b). It is a well-known rule that when a legislative body enacts without change a statute which has been judicially construed, the legislature is deemed to have approved and adopted the construction placed upon that act by the courts.

The *Fitzgerald* case is in accord with other decisions construing similar language in the federal statutes regulating other modes of interstate transportation. In *National Association for Advancement of Colored People vs. St. Louis-San Francisco Rwy Co.*, ICC No. 31423, 1 Race Rel. Law Rep. 263 (1956), the Interstate Commerce Commission ruled that the statute under which it functions prohibited passenger segregation on interstate rail travel. The Commission said:

> "The complainants invoke our authority to prevent violations of section 3(1), which makes it unlawful for a rail carrier 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The disadvantage to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable."

See also *Keys vs. Carolina Coach Co.*, ICC No. MC-C-1564, 1 Race Rel. Law Rep. 272 (1956), where the Commission ruled that racial discrimination in bus transportation was prohibited by the applicable federal statute. The statutory language involved in this case was exactly the same as that found in the C.A.A. and given the same construction in the *Fitzgerald* case.

The comprehensive scope of federal legislation with respect to interstate air carriers is obvious. When the pervasiveness of federal regulation of the industry generally is considered in connection with the specific federal laws and regulations (and the cases interpreting those laws and regulations) prohibiting racial discrimination by interstate air carriers, there can be no doubt but that federal law has covered the subject matter involved herein and leaves no room for the application of Colorado Law.

Executive orders prohibit discrimination by Government contractors. This is yet another federal regulatory system which covers racial discrimination by Petitioner and others similarly situated. By Executive Order 10479, August 13, 1953, the President established the Government Contracts Committee. The purpose of the committee is to prevent persons contracting with the federal government from discriminating on account of "race, creed, color or national origin." The committee recommended, and the President ordered in Executive Order 10557, September 3, 1954, that the following clause be included in all contracts executed by the contracting agencies of the federal government:

> "In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment

because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

As a certificated commercial carrier by air, Petitioner is obligated to and in fact does transport United States mail under contract with the United States Government. 49 U. S.C.A. Section 485(a), 49 U.S.C.A. (Supp.) Section 1375. Therefore, Continental remains constantly in the status of one contracting with the federal government and subject to the non-discrimination policy required of such contractors. Specifically, Continental is prohibited from discriminating against "any employee or applicant for employment" because of race "in connection with the performance of any work" under government contracts. Obviously, members of flight crews are engaged in the performance of work in connection with transporting the mail. Again, federal regulation occupies the field.

If federal law occupies a field, it does so exclusively and it is immaterial whether or not the federal power is exercised. Perhaps the outstanding example of this principle is *Guss vs. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 (1957). The court held in effect that where the matter of prevention of unfair labor practices affecting commerce had been occupied by the National Labor Relations Act, the occupation was exclusive and barred

state action pursuant to state law, notwithstanding the fact that the NLRB had refused to act in the specific matter because of jurisdictional yardsticks established by it. The case is famous because the Court was fully aware of the so-called no man's land which existed where the federal government had jurisdiction but refused to act and the state government could not act. Nevertheless, Federal law "pre-empted" the field and the state was powerless to act.

To the same effect is *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). The Court there held that state labor law could not enter fields which might arguably (though not definitely) be covered by the federal labor act. Several statements made by the Court indicate the breadth of the doctrine of pre-emption and the restrictions placed upon the extension of state law into areas covered by federal law:

> "In the light of these principles, the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced.
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> "Even the States' salutory effort to redaress private wrongs or grant compensation for past harms cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 79 S.Ct. at 780.

These recent United States Supreme Court decisions delineate the scope of the pre-emption doctrine. The Rail-

way Labor Act, the Civil Aeronautics Act and the Executive Orders pertaining to Government Contractors all deal directly and forcefully with racial discrimination by interstate air carriers. Hence, Colorado's racial policies may not be extended to this area.

In conclusion, the Court finds that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier.

Accordingly, the findings of the Colorado Anti-Discrimination Commission are set aside, and the Complaint of Mahlong D. Green is dismissed.

The Court orders that a Motion for a New Trial be dispensed with, and if filed, would be overruled.

Dated this 7th day of January, A.D. 1961.

BY THE COURT:

/s/ William A. Black
District Judge